UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 07 1717

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ APR 25 2007 ★
LONG ISLAND OFFICE

DANIEL DEFABIO, PATRICIA DEFABIO, and MICHAEL RUSINSKY,

Plaintiffs,

(S. F.)

- against -

COMPLAINT

Index No.

BIANCO, J.
LINDSAY, M.

EAST HAMPTON UNION FREE SCHOOL DISTRICT, SCOTT FARINA, Individually and in his official capacity as Principal of East Hampton High School, RAYMOND GUALTIERI, Individually and in his official capacity as Superintendent of Schools of East Hampton Union Free School District, WENDY HALL, Individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, STEPHEN TALMAGE, Individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District LAURA ANKER GROSSMAN, Individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, SHARON BACON, Individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, THERESA K. QUIGLEY, J.D., Individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, JOHN RYAN, SR., Individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District and MICHAEL TRACEY, Individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District,

Defendants.

Plaintiffs, by their attorneys Kuntz, Spagnuolo & Murphy, as and for a complaint, respectfully allege as follows:

NATURE OF ACTION

1. This is an action for compensatory and punitive damages proximately resulting from Defendants' acting in such a manner as to violate Plaintiffs' rights to Free Speech, Equal Protection and Due Process of Law guaranteed under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. 1981, 1983 and the Constitution of the State of New York.

JURISDICTION AND VENUE

2. This action arises under the First and Fourteenth Amendments to the United States Constitution, and under Federal Law, particularly 42 U.S.C. § 1983.

3. The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1331 and 1343 on the ground that this action arises under the First and Fourteenth Amendments to the U.S. Constitution and under 42 U.S.C. 1981, 1983 and 1985.

4. This Court is authorized to grant Plaintiffs' prayer for relief regarding costs, including a reasonable attorney's fee under 42 U.S.C. § 1988.

5. The unlawful practices and constitutional violations alleged below were committed within the boundaries of the Eastern District of the United States District Court of the State of New York. Venue is properly placed therein pursuant to 28 U.S.C. 1391.

THE PARTIES

6. Plaintiff, Daniel DeFabio ("Danny") is a citizen of the United States residing in Montauk, New York. At all times relevant herein he possessed all rights guaranteed by the First and Fourteenth Amendment. Plaintiff also during the relevant time period had a right under the New York State Constitution to attend school and to receive an education at the East Hampton Union Free School District.

7. During the 2003/04 school year, Danny was sixteen years old and in the tenth grade at East Hampton High School. He had been attending East Hampton High School for two years and had no disciplinary record.

8. At all times relevant herein, Plaintiff, Patricia DeFabio was and is the mother and natural guardian of Daniel DeFabio, and as such, was legally responsible for the physical, emotional and financial well being of Daniel DeFabio. Prior to the incident alleged in the complaint, Plaintiff Daniel DeFabio resided with Patricia DeFabio.

9. At all times relevant herein, Plaintiff, Michael Rusinsky, resided in the family home of Daniel DeFabio and Patricia DeFabio. Michael Rusinsky shared in the responsibility for the physical, emotional and financial well being of Daniel DeFabio and regards himself as Danny's stepfather.

10. Defendant East Hampton Union Free School District (Hereinafter the "District") is a public school district organized and existing pursuant to the laws of the State of New York and statutorily obligated to educate students entrusted to its care.

11. Defendant Scott Farina is employed as the High School Principal of the East Hampton High School, and is sued in his individual capacity as well as his official capacity. Defendant Farina establishes and implements policy for the District.

12. As Principal, Defendant Farina is one of the District agents responsible for the discipline of students for out of school suspensions which do not exceed five days and must comply with applicable laws pertaining to such discipline.

13. Defendant Raymond Gualtieri is the Superintendent of Schools of the East Hampton Union Free School District and is sued in his individual and official capacities. Defendant Gualtieri establishes and implements policy for the District.

14. As Superintendent of Schools, Defendant Gualtieri is responsible for the discipline of students in excess of a five day suspension and must comply with applicable laws pertaining to such discipline.

15. Wendy Hall, Stephen Talmage, Laura Anker Grossman, Sharon Bacon, Theresa K. Quigley, J.D., John Ryan, Sr. and Michael Tracey were members of the Board of Education of East Hampton Union Free School District at the time Daniel DeFabio was in attendance at school. They are sued in their individual and official capacities. Board Members are responsible for appeals of student discipline matters and for enacting policies. They have supervisory responsibility over officers and other employees of the School District.

STATEMENT OF THE CASE

16. On April 24, 2004, a student of the East Hampton High School was killed in a motorcycle accident. The student was of Hispanic descent.

17. Monday, April 26, 2004, was a day of mourning in the school. The District had made arrangements to handle the death of the student with the assistance of the school's crisis team, a group of guidance counselors, social workers and other faculty members. The school had arranged a moment of silence, stationing guidance counselors in the school auditorium, attendance of the school social worker in the student's classes and the distribution of the student's artwork to his friends.

18. Plaintiff, Daniel DeFabio, a student at the high school, was walking through the school hallways to his third period science class when he heard a student say "one down, 40,000 to go," in an apparent reference to the youth who died in the motorcycle accident.

19. Upon arriving at his next class, Daniel stated to a fellow student, Donald Alversa, in a whispering voice with his hand cupped around Donald's ear "I just heard someone say 'one down, 40,000 to go.'"

20. Daniel did not repeat the comment again in school or say it again to any other student. Daniel did not say the initial comment loud enough to disrupt school activities.

21. Because of the whisper, Donald did not hear Daniel correctly and perceived Daniel as the originator of the comment. Donald became angry and pushed Daniel. Daniel responded by stating "That's not what I said, that's what I heard in the hallway".

22. Daniel then saw Donald whisper something to another student, Nicole Cummings, who then gave Daniel a dirty look. Daniel said again that he was not the original author of the comment.

23. Upon information and belief, Donald Alversa repeated the statement to other students in the school and told other students that Daniel had made the original comment.

24. Later that same day during lunch period and in the cafeteria, several students of Hispanic descent confronted Daniel and accused him of making the comment. Daniel, having the opportunity to speak to the students, denied making the comment and the students walked away.

25. A guidance counselor, Mr. Ralph Naglieri, learned of the confrontation and asked Daniel to accompany him to the nurse's office, where Daniel informed him of the facts as stated above.

26. Donald Alversa was in the nurse's office at the same time and was questioned by Mr. Naglieri. Donald initially admitted that he did not hear the entire comment and that Daniel

repeated the statement of another person in the hallway. Later he recanted and alleged that Daniel was the originator of the statement.

27. The Assistant Principal, Mr. Pratt, entered the office and Daniel told him what happened. Shortly after that, the High School Principal, Defendant Dr. Scott Farina, entered the room.

28. Dr. Farina made no attempt to discern the facts. He asked Daniel only one question -- how to contact Daniel's mother. Daniel had no other conversation with Dr. Farina that day.

29. Dr. Farina called Patricia DeFabio and told her that Daniel was being sent home from school and that he would be escorted home by Assistant Principal Pratt and a police officer. When Ms. DeFabio offered to come pick up Daniel, she was told by Dr. Farina that there were 150 students who wanted to "knock down his door to beat up Daniel."

30. Dr. Farina advised Ms. DeFabio that Daniel should remain out of school for the rest of the school year.

31. Defendants arranged to have Daniel taken home by Mr. Pratt and a police officer.

32. Michael Rusinsky, Daniel's step father, went to the High School to speak with Dr. Farina about the incident. He requested a meeting with all of the parties, including the complaining witness, but the Principal refused to meet with him.

33. On April 27, 2004, Ms. DeFabio called Dr. Farina who told Ms. DeFabio that the school could not ensure Daniel's safety and he could not come to school. Having created a dangerous situation for Daniel, by falsely accusing Daniel of making the comment with no investigation, contacting the local police department and having Daniel escorted home by the

police, Dr. Farina told Ms. DeFabio that there were threats to burn down Daniel's house and kill him.

34. On April 27, 2004, Daniel asked Dr. Farina if he could prepare a statement to be read to the students to clear up the confusion about the comments. Daniel faxed a statement to Dr. Farina but the letter was never presented to the students and Daniel's request was denied.

35. By removing Daniel from the school he was prevented from communicating with his classmates the truth about the comment during non-instructional time.

36. On April 28, 2004, Ms. DeFabio and Plaintiff Michael Rusinsky, went to the High School and met with Dr. Farina, guidance counselor Karen Leiber, and an Assistant Principal, Michael Burns. Ms. Leiber and Mr. Burns, both told Ms. DeFabio that they knew Daniel was a "good kid" who wouldn't say what was alleged.

37. Despite their support for Daniel, Ms. DeFabio and Mr. Rusinsky were told that Daniel could not return to school because his presence "created a problem." Dr. Farina told Ms. Defabio and Mr. Rusinsky that Daniel's absence from school was necessary to "calm the situation."

38. On April 29, 2004, an article appeared in the East Hampton Star reporting that "less than 48 hours after the death of an East Hampton High School student, a racial slur reportedly marred a day of mourning, leading school officials to call East Hampton Town police."

39. Dr. Farina was quoted as stating that "there was a comment said in a classroom, and it upset several of Andres's friends and students." The article reported that four East Hampton Town Police cars were sent to the high school after the department received a call from Dr. Farina at 1:38 p.m.

40. The article reported that "the student who made the inappropriate comment was escorted from the building by a police officer and Philip Pratt an assistant principal, 'for his own safety.'"

41. After publication of the article, Daniel asked Dr. Farina if he could read the statement he had written during the morning announcements at school. Acting under color of state law, Dr. Farina refused.

42. Daniel requested the opportunity to meet with students and staff at school so that he could state his position. Acting under color of state law, Defendants denied Daniel's request.

43. Acting under color of state law, Defendants denied Daniel entry into school on April 27, 28, and 29, 2004. Daniel was provided with no notice of any charged misconduct or a due process hearing in any form. Daniel was also not offered home tutoring. He was marked absent.

44. The principal use to which public schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities.

45. Among those activities is personal intercommunication among the students. When the student is on the campus during the authorized hours of school, he may express his opinions, even on controversial subjects.

46. During the school day at East Hampton High School, there are periods of non-instructional time, including lunch, recess and after school where students are able to engage in free speech activities.

47. During the non-instructional time, students are free to talk to each other about any topic, including matters of public concern, they can pass notes and letters to one another.

48. Daniel wanted to distribute his statement and speak to his fellow students to deny and explain the comments attributed to him, during non-instructional time.

49. Defendants had a policy, custom and practice that prohibited the distribution of Daniel's statement to his fellow students and denied Daniel the opportunity to engage in free speech activities on school grounds.

50. Defendants policy had no standards or guidelines to guide the school administrator in granting or denying Daniel's request to distribute his statement, address his fellow students or engage in free speech activities during non-instructional time.

51. Defendants policy was arbitrarily applied to prevent Daniel from engaging in free speech activities and was a prior restraint of his speech in violation of the First Amendment of the United States Constitution.

52. Defendants' policy did not contain any standards or guidelines by which school officials could determine which materials and literature are subject to the policy and which are not.

53. Defendants' policy is vague and overbroad.

54. Defendants' policy lacks objective standards.

55. Defendants' policy unconstitutionally discriminated on the basis of the subject matter or viewpoint of the statement Daniel wished to communicate by making a determination as to whether the statement would be allowed or denied based upon the content and/or the viewpoint espoused by the statement.

56. Daniel wanted to distribute his statement and speak to his fellow classmates during non-instructional time but was unable to do so because of Defendants' arbitrary policy

and practice denying him admission to school. Defendants policy and actions chilled Daniel's speech.

57. The statement did not contain any words, messages or phrases that would cause a substantial disruption in the school environment.

58. The statement did not contain any words, messages or phrases that would impede on the rights of other students.

59. The statement did not contain any words, messages or phrases that would be considered libelous.

60. The statement did not contain any words, messages or phrases that would be considered vulgar, lewd or obscene.

61. Defendants' policy permits students to give information and exchange thoughts and ideas with friends and fellow students on school grounds before, during and after school.

62. Defendants' policy that prohibited the distribution of Daniel's statement on school grounds during non-instructional time is a blatant violation of Daniel's right to free speech and equal protection under the law.

63. Defendants' policy that prohibited Daniel from speaking to his fellow students on school grounds during non-instructional time is a violation of Daniel's right to free speech and equal protection under the law.

64. Defendants either knew, or should have known, that Daniel had a constitutionally protected right to freedom of speech during non-instructional time, and despite this knowledge, has clearly violated Daniel's constitutional rights.

65. Defendants' policy and actions that prohibited Daniel from distributing his statement and speaking to fellow students on school grounds during non-instructional time are a content-based discrimination on free speech.

66. Defendants' policy and actions that prohibited Daniel from distributing his statement and speaking to fellow students on school grounds during non-instructional time are a viewpoint based discrimination on free speech.

67. Defendants' policy and actions were an unreasonable prior restraint on speech.

68. Defendants' policy and actions was not supported by a compelling governmental interest advanced in the least restrictive means.

69. Defendants either knew or should have known that denying Daniel the right to distribute his statement and speak to his fellow students was a violation of his right to freedom of speech and equal protection.

70. On April 30, 2004, Plaintiffs hired an attorney. The attorney contacted the school seeking Daniel's reentry.

71. In response to Plaintiff's attorney's appeal to have Daniel readmitted to school, the Defendants notified Plaintiffs that Daniel was suspended for five days. On April 30, 2004, Dr. Farina wrote to Ms. DeFabio informing her that Daniel was being suspended from school for another 5 days (May 3 through May 7) and that a Superintendent's hearing might be convened. The letter was hand delivered to Ms. DeFabio.

72. The suspension letter informed Daniel of the right to a conference with the Principal but failed to inform him that he was entitled to ask questions of the complaining witnesses. Ms. DeFabio requested the conference the next day, Saturday, by leaving a message on Dr. Farina's voice mail.

73. Despite this request, the District did not provide the Plaintiffs with an informal conference or the right to confront and ask questions of the complaining witness.

74. Defendants had a policy or practice of failing to inform students of their rights, and as such, Dr. Farina was acting under color of state law.

75. On Monday, May 3, 2004, Defendant Gualtieri (Superintendent of Schools), sent Patricia DeFabio a notice of a Superintendent's hearing scheduled for May 7, 2004. On May 7, 2004, Daniel and Patricia DeFabio arrived at the Superintendent's office, with their attorney, approximately 30 minutes early.

76. Prior to the hearing, the Plaintiffs and their attorney witnessed Gualtieri, the School Attorney, Robert Sapir, Donald Alversa and Donald's mother in a conference room. Several minutes later, one of the men asked Nicole Cummings and her father to enter the room. The District's attorney, Mr. Robert Sapir stated that they were interviewing the witnesses.

77. After Gualtieri and the attorney for the District interviewed the witnesses, the hearing was conducted.

78. After the Superintendent's hearing, Dr. Farina brought Daniel to a room with a group of twelve students whom he claimed were "representatives of the Latino community in the school." At that meeting, the students questioned why Daniel didn't try to defend himself during the past several weeks that he was out of school.

79. Daniel's enforced silence by the Defendants was construed by the students as an admission of guilt further fueling their anger at Daniel.

80. At that meeting, Dr. Farina admitted that Defendants had not permitted Daniel to return to school and that he had denied Daniel's request to disseminate Daniel's statement explaining the circumstances of the comment.

81. In a letter dated May 10, 2004, Gualtieri found Daniel guilty of the charge and suspended him from school for the remainder of the 2003-04 school year.

82. The suspension for the term originally suggested by Farina evidences a conspiracy or joint effort between Farina and Gualtieri to punish the Plaintiff Daniel DeFabio, in violation of his rights to procedural and substantive due process under the 1st 14th Amendments, to keep Daniel off school property, and to deny Daniel his right to engage in free speech activities during non-instructional time.

83. The Plaintiffs requested an appeal of the Superintendent's decision to the Board of Education. The Plaintiffs were not offered an opportunity to discuss the appeal with the Board, nor were they advised of the date the appeal would be heard. The Plaintiffs also requested a record of the Superintendent's hearing, but the tape recording supplied by the District was inaudible.

84. Upon information and belief, the appeal was heard by the Board of Education on May 18, 2004. By letter dated May 27, 2004, the Board of Education denied the appeal and upheld the decision of the Superintendent of Schools.

85. On June 24, 2004, Ms. DeFabio spoke with two trustees of the Board of Education and asked them if the tape recording was audible. One trustee indicated it was inaudible. The other stated it was very difficult to understand and that the District was going to purchase new recording equipment.

86. Instead of insisting that the Board be provided with an audible tape recording or requiring a new hearing, Defendants Hall, Talmage, Grossman, Bacon, Quigley, Ryan and Tracey denied the appeal. In doing so the Board of Education violated their duty to hear the appeal and failed to insure that the Superintendent did not violate Plaintiff Daniel DeFabio's

rights. Since the Board of Education was not provided with an audible record of the proceeding, Daniel DeFabio was denied the right to an appeal.

87. Upon information and belief, Gualtieri, the Board Defendants, and the District had a policy or practice of denying students a fair hearing and appeal process.

88. On June 28, 2004, the Petitioner commenced a proceeding before the Commissioner of Education of the State of New York alleging the entire process was fundamentally unfair and procedurally flawed and requesting a reversal of the suspension and expungement of the student's record.

89. During the course of the proceeding, the District provided the Plaintiffs with a new recording of the disciplinary proceeding. While the new recording was more audible than the previous version, it was still difficult to hear, and it was not made available to the Plaintiffs, or the Board prior to the appeal of the Superintendent's decision.

90. In a decision dated August 7, 2006, the Commissioner of Education sustained the appeal and overturned the decision of the Superintendent of Schools. (Attached hereto as Exhibit "A") The Commissioner ordered that the incident be expunged from the student's records.

91. The Commissioner determined that Defendant Farina failed to inform Daniel of his rights to confront complaining witnesses prior to the suspension. As a consequence, the Commissioner annulled the five day suspension imposed by Defendant Farina and expunged it from Daniel's records.

92. The Commissioner also determined that Defendant Gualtieri did not discuss any facts or testimony of the witnesses and his decision does not demonstrate that he addressed or weighed their credibility or demeanor. The Commissioner determined that the record did not

contain sufficient evidence that Plaintiff committed the charged conduct. As a consequence, he annulled the long term suspension and expunged the student's records.

93. On or about July 20, 2004, Plaintiffs met with Dr. Farina to discuss Daniel's reentry to the high school in September, 2004.

94. Having knowledge that Daniel was the target of bullying and threats against his person and property, Plaintiffs requested information on what steps the District would take to ensure Daniel's safety in school.

95. Defendant Farina stated that the District could not insure Daniel's safety in school. Dr. Farina made no effort to implement any measures to protect Daniel in school, despite knowledge of threats against him.

96. As a result of all these circumstances, it was determined by Plaintiffs that Daniel would have to leave the state to be safe.

97. Defendant Farina's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

98. Defendant Gualtieri's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

99. Defendant Hall's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

100. Defendant Talmage's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

101. Defendant Anker-Grossman's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

102. Defendant Bacon's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

103. Defendant Quigley's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

104. Defendant Ryan's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

105. Defendant Tracey's conduct was the proximate cause of the violation of Plaintiff Daniel Defabio's federally protected rights.

106. The District violated Daniel DeFabio's substantive and procedural due process rights and deprived the student of his rights secured by the state and federal constitutions. As a result of the Defendants' violation of Plaintiff's rights, he received threats upon his life and his family, and suffered humiliation, embarrassment, depression, mental anguish, anxiety, suicidal ideation and other pain and suffering.

107. As a result of Defendants' wrongful conduct, Plaintiff Daniel DeFabio was afraid to leave his house and was forced to quit his job, move from his residence, enroll in a new school, and leave his friends and family.

108. Plaintiffs Patricia DeFabio and Michael Rusinsky also suffered threats against their lives and family, humiliation, embarrassment, depression, mental anguish, anxiety, and other pain and suffering. Plaintiffs suffered financial losses from psychological counseling, moving expenses for Daniel, educational expenses for Daniel, and suffered time away from their businesses.

109. The Defendants have at all times relevant herein acted willfully and with malice toward the Plaintiff. The Defendants' knew, or should reasonably have known, that their

conduct was unlawful and specifically in violation of the laws of the State of New York and the United States of America.

INCORPORATION OF ALLEGATIONS

110. Each of the foregoing allegations is incorporated into each of the following claims for relief as if fully set forth in each claim.

AS AND FOR A FIRST CAUSE OF ACTION

111. Defendants violated Plaintiff Daniel Defabio's First Amendment right to freedom of speech by denying him the ability to distribute his statement to the school community, communicate with his fellow students and school staff, engage in personal intercommunication on school grounds and otherwise participate in free speech activities by depriving him of his right to attend school.

112. Defendants either knew, or should have known, that denying Plaintiff Daniel Defabio the ability to communicate with his fellow students and distribute his statement during non-instructional time at school was a violation of Plaintiff Daniel Defabio's First Amendment rights.

AS AND FOR A SECOND CAUSE OF ACTION

113. Defendants denied Plaintiff his right to life, liberty and property without due process of law under the First and Fourteenth Amendments to the Constitution of the United States of America, when it failed to inform him of his rights, denied him those rights when he requested them, wrongfully excluded him from school and found him guilty of charges without legal basis.

AS AND FOR A THIRD CAUSE OF ACTION

114. Defendants denied plaintiff his right to a free public education, guaranteed by the statutes and constitution of the State of New York, without due process of law.

AS AND FOR A FOURTH CAUSE OF ACTION

115. Defendants' actions are unconstitutional abridgements of Plaintiff Daniel Defabio's affirmative right to equal protection of the laws under the Fourteenth Amendment. Defendants treated Plaintiff Daniel Defabio differently from other similarly situated students on the basis of the expression of Plaintiff Daniel Defabio's message.

AS AND FOR A FIFTH CAUSE OF ACTION

116. Defendants created a dangerous environment for Daniel by disseminating stigmatizing information and prohibited Plaintiff Daniel Defabio from attending school to refute the false accusations, denied Plaintiff Daniel Defabio his liberty right to bodily integrity and to be free from stigma without due process due him under the Fourteenth Amendment of the Constitution of the United States of America.

AS AND FOR A SIXTH CAUSE OF ACTION

117. Defendants slandered and libeled Plaintiff Daniel Defabio by publishing and disseminating information which was untrue and damaging to his character and reputation.

AS AND FOR A SEVENTH CAUSE OF ACTION

118. Defendants actions caused Plaintiffs Patricia Defabio and Michael Rusinsky to suffer humiliation, embarrassment, depression, mental anguish, anxiety, and other pain and suffering and to expend money on their behalf and Daniel's behalf as a consequence.

WHEREFORE, judgment is respectfully demanded:

a. Awarding as against all defendants such compensatory, punitive and equitable damages in the amount of five million dollars or such amount as the jury may impose,

b. Awarding as against all individual defendants such punitive damages as the jury may impose,

c. Awarding as against all defendants the costs and disbursements of this matter, together with reasonable attorneys' fees pursuant to 42. U.S.C. 1988.

d. Such other and further relief as the Court deems just and proper.

Dated: April 25, 2007
Bedford, New York

Yours etc.,

Ray Kuntz

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TO: Clerk of the Court RGK
United States District Court
Eastern District of New York

EXHIBIT A

No. 15438

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of P.D., on behalf of her son D.D., from action of the Board of Education of the East Hampton Union Free School District regarding student discipline.

Kuntz, Spagnuolo, Scapoli & Schiro, P.C., attorneys for petitioner, Thomas Scapoli, Esq., of counsel

Cooper, Sapir & Cohen, P.C., attorneys for respondent, Robert E. Sapir, Esq., of counsel

Petitioner appeals the suspension of her son, D.D., by the Board of Education of the East Hampton Union Free School District ("respondent"). The appeal must be sustained in part.

On Saturday, April 24, 2004, a Hispanic student who attended East Hampton High School was killed in a motorcycle accident. The following Monday, D.D. whispered a racially biased comment in reference to the death of that student, and other Hispanics in general, to a fellow student, D.A., who told other students in the school that D.D. had made the comment. According to D.D., however, he did not originate the comment but merely related to D.A. what he overheard in the hall. After a confrontation arose between D.D. and other students who accused him of making the comment, the high school principal contacted petitioner and advised her that the assistant principal and a police officer would be escorting D.D. home from school. Later that afternoon, petitioner's husband (D.D.'s stepfather) went to the high school to meet with the principal. D.D. did not attend school on April 27, 28 or 29, 2004. On April 29, 2004, petitioner and her husband met with the principal, an assistant principal and a guidance counselor.

By hand-delivered letter dated Friday, April 30, 2004, the principal suspended D.D. for five days, from May 3 through May 7, 2004, and informed petitioner that a superintendent's hearing might be convened. The letter stated that D.D. violated the high school's Code of Conduct by making the racial comment and that petitioner and D.D. were entitled to an informal conference to discuss the suspension if requested within 24 hours. It also stated that "per our phone conversation on Monday, April 26th and meeting on Thursday April 29th, it was in the interest of [D.D.]'s safety that he remain home pending the results of the investigation." Petitioner states that on Saturday, May 1, she left a message on the principal's voice mail requesting a conference.

By letter dated May 3, 2004, the superintendent notified petitioner of a hearing scheduled for May 7, 2004. At the hearing, D.A., another student, the principal and D.D. testified. By letter dated May 10, 2004, the superintendent notified petitioner that he found D.D. guilty of the charge and suspended him from school for the remainder of the 2003-2004 school year. Petitioner appealed the superintendent's decision to respondent. By letter dated May 27, 2004, the superintendent notified petitioner that on May 18, 2004, respondent had reviewed the record of the superintendent's hearing and had upheld his determination and penalty. This appeal ensued.

Petitioner contends that D.D. was suspended and not permitted to attend school on April 27, 28 and 29, 2004 even though he did not receive notice of the suspension, was not charged with misconduct and did not receive a due process hearing. Petitioner also states that D.D. was not offered alternative instruction during this time. With respect to the five-day suspension from May 3 through May 7, petitioner contends that the notice was defective and that the district failed to provide her and D.D. with an informal conference with the principal and an opportunity to confront the complaining witnesses prior to the suspension.

With respect to the long-term suspension, petitioner asserts that D.D. was denied a fair hearing because the superintendent was present when the school attorney interviewed the witnesses prior to the hearing. Petitioner also contends that the district failed to prove that D.D.

committed the charged conduct. Finally, petitioner asserts that D.D. was denied the right to appeal the superintendent's determination to respondent because the recording of the hearing was inaudible. Petitioner requests that the suspension be annulled and expunged from D.D.'s records.

Respondent maintains that it acted properly in all respects. It asserts that petitioner voluntarily kept D.D. home in the days immediately following the incident. It also asserts that the April 30 written notice of the suspension was legally sufficient, that petitioner withdrew her request for an informal conference with the principal at which he would have informed her of her right to question the complaining witness, and that all claims regarding D.D.'s five-day suspension and the informal conference are untimely. Respondent contends that D.D. received all his due process rights at the superintendent's hearing, and denies that the superintendent was present while the witnesses were interviewed or that the hearing record was inaudible.

An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of O'Brien, 44 Ed Dept Rep 43, Decision No. 15,092; Appeal of Spina, 43 id. 354, Decision No. 15,016). Respondent contends that petitioner's claims regarding D.D.'s five-day suspension from May 3 through 7, 2004 are untimely because the petition is dated June 24, 2004, more than 30 days after the suspension.

In this case, D.D.'s five-day suspension was followed by a superintendent's hearing, from which petitioner had not only the right but the requirement to exhaust her administrative remedy by appealing to respondent before commencing an appeal (Education Law §3214[3][c][1]; Appeal of A.S. and S.K., 44 Ed Dept Rep 129, Decision No. 15,122; Appeal of D.C., 41 id. 190, Decision No. 14,661). The underlying charges for both the five-day and the long term suspensions were the same. Accordingly, I will not dismiss the appeal as untimely.

Petitioner contends that D.D. was improperly suspended without notice for three days immediately following the incident. Respondent asserts that the principal informed petitioner on April 26 that he was sending D.D. home for his own safety. Respondent further asserts that D.D. was not suspended at that time, that petitioner voluntarily kept D.D. at home and that he was marked absent on those days. In her reply, petitioner states that the principal insisted that D.D. remain home and that she acquiesced. She also states that she and her husband actively tried to resolve the situation with the principal during those days in order to allow D.D. to return to school but were unsuccessful. In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Patton, et al., 42 Ed Dept Rep 226, Decision No. 14,832; Appeal of Pope, 40 id. 473, Decision No. 14,530). The record before me does not indicate that D.D. was suspended at that time. Accordingly, this claim must be dismissed.

With respect to the five-day suspension, petitioner argues that the notice was defective in that it did not inform her of the opportunity to confront complaining witnesses at the informal conference. Respondent argues that there is no requirement that the written notice include this information and that the petitioner would have been extended that right had there been an informal conference.

When a principal proposes to suspend a student from attendance for a period of five days or less, §100.2(l)(4) of the Commissioner's regulations requires that the written notice:

> . . . provide a description of the incident(s) for which suspension is proposed and shall inform the parents . . . of their right to request an immediate informal conference with the principal in accordance with the provisions of Education Law, section 3214(3)(b).

The purpose of this regulation is to ensure that parents of a student suspended for five days or less are made aware of the statutory right provided in Education Law §3214(3)(b)(1) to question the complaining witnesses in the presence of the principal who imposed the suspension in the first instance, and who has authority to terminate or reduce the suspension (Appeal of M.S., 44 Ed Dept Rep 478, Decision No. 15,237; Appeal of a Student Suspected of Having a Disability, 44 id. 475, Decision No. 15,236). It is insufficient to provide merely an opportunity to speak to the principal without the complaining witnesses present, or an opportunity to speak to the complaining witnesses without the principal present (Appeal of B.C. and A.C., 42 Ed Dept Rep 395, Decision No. 14,891; Appeal of a Student Suspected of Having a Disability, 40 id. 542, Decision No. 14,552; Appeal of a Student with a Disability, 38 id. 378, Decision No. 14,059; Appeal of Milano, 37 id. 472, Decision No. 13,908).

In this case, the principal's April 30 letter did not meet the requirements described above. It failed to inform petitioner that she could request an opportunity to question complaining witnesses (Appeal of M.S., 44 Ed Dept Rep 478, Decision No. 15,237; Appeal of a Student Suspected of Having a Disability, 44 id. 475, Decision No. 15,236). Accordingly, the five-day suspension must be annulled and expunged from D.D.'s record.

As to the long-term suspension, the decision to suspend a student from school pursuant to Education Law §3214 must be based on competent and substantial evidence that the student participated in the objectionable conduct (Bd. of Educ. of Monticello Cent. School Dist. v. Commissioner of Educ., et al., 91 NY2d 133; Bd. of Educ. of City School Dist. of City of New York v. Mills, et al., 293 AD2d 37; Appeal of L.T., 44 Ed Dept Rep 89, Decision No. 15,107). A hearing officer may draw a reasonable inference if the record supports the inference (Bd. of Educ. of Monticello Cent. School Dist. v. Commissioner of Educ., et al., 91 NY2d 133; Appeal of a Student with a Disability, 44 Ed Dept Rep 136, Decision No. 15,124; Appeal of M.P., 44 id. 132, Decision No. 15,123).

Petitioner claims that respondent could not review the record on appeal because the hearing record is inaudible. An intelligible record of the hearing must be maintained in order to permit a meaningful review (Education Law §3214[3][c]; Appeal of A.G., 41 Ed Dept Rep 262, Decision No. 14,681; Matter of Labriola, 20 id. 74, Decision No. 10,321). Both parties provided audiotapes of the hearing. While the quality of the tapes is poor, and progressively worsens over the course of the hearing, I find they are sufficiently audible to hear the testimony of the four witnesses. Thus, I find that respondent was able to sufficiently review the hearing record on appeal.

The tapes reveal that at the hearing, D.A., another student, the principal and D.D. testified under oath. D.D. admitted that he made the comment to D.A., but consistently maintained that he had overheard the comment in the hallway and merely repeated it. D.D. stated that at one point when administrators questioned D.A., he heard D.A. admit that he might have misheard or misunderstood D.D., but that D.A. later recanted. D.A. admitted that he was the one who retold the comment to other students and attributed it to D.D., but denied that D.D. had prefaced the original statement by saying: "I heard someone say . . ." or words to that effect. The other student witness admitted that she did not hear the exchange between D.D. and D.A. In addition, the principal admitted that his investigation did not include any subsequent interviews with D.D. after the day of the incident and there were no written reports of any investigation to substantiate the charges.

With respect to findings of fact in matters involving the credibility of witnesses, I usually will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the determination of credibility is inconsistent with the facts (Appeal of B.K. and R.K., 44 Ed Dept Rep 195, Decision No. 15,146; Appeal of T.R. and M.D., 43 id. 411, Decision No. 15,036; Appeal of K.M., 41 id. 318, Decision No. 14,699). A hearing officer may draw a reasonable inference if the record supports the inference (Bd. of Educ. of Monticello Cent. School Dist. v. Commissioner of Educ., et al., 91 NY2d 133; Appeal of a Student with a Disability, 44 Ed Dept Rep 136, Decision No. 15,124; Appeal of M.P., 44 id. 132, Decision No. 15,123). In this case, however, the superintendent's determination consisted merely of one sentence: "After reviewing the facts and testimony of the Superintendent's hearing held on Friday, May 7, 2004, I find [D.D.] guilty as charged." Notably, the superintendent failed to discuss any facts or testimony of the witnesses and his decision does not demonstrate that he addressed or weighed their credibility or demeanor. I cannot, therefore, defer to the superintendent's determination or assessment of witness credibility, and must instead determine whether there is sufficient and competent evidence that D.D. participated in the objectionable conduct as charged.

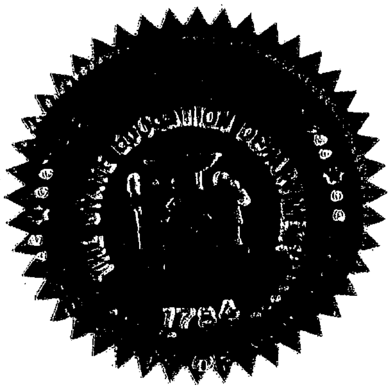
With respect to the issue of proof, the evidence on the record is at best, equivocal, since D.D. and D.A.'s statements were directly contradictory. Consequently, the case depends solely on their credibility and that of the other student. In my assessment, the aural record revealed that D.D. consistently maintained his version of the events, both at the hearing and to the principal, whereas D.A.'s testimony and demeanor were not as straightforward. Furthermore, the principal admitted there was no further investigation or report in close time proximity to the incident. While I recognize the highly charged emotional atmosphere surrounding this event, and do not in any way condone the biased nature of the comment, under the circumstances of this case and the record before me, I am constrained to determine that the record does not contain sufficient and competent evidence that D.D. generated the offensive comment and thus engaged in the objectionable conduct as charged. Therefore, the suspension must be annulled and expunged from D.D.'s record.

In light of this determination, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondent's five-day suspension of petitioner's son from May 3-7, 2004 be annulled and expunged from his record.

IT IS FURTHER ORDERED that respondent's suspension of petitioner's son from May 10, 2004 through the end of 2003-2004 school year be annulled and expunged from his record.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 7th day of August, 2006.

Richard P. Mills

Commissioner of Education